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ABSTRACT

This chapter analyzes more than 200 cases reported in 1986 involving public-sector employees in elementary and secondary education. Also included, where appropriate, are relevant 1986 Supreme Court cases from outside the field of education, as well as leading cases from prior years. Legal issues covered by the review include the following: (1) discrimination in employment by race, religion, sex, national origin, age, or handicap; (2) substantive constitutional rights, including freedom of speech, association, and religion, along with issues of privacy and substantive due process; (3) procedural due process; (4) issues of dismissal, nonrenewal, demotion, and discipline (for insubordination, unprofessional conduct, immorality, or incompetence); (5) reduction in force and involuntary leaves of absence; (6) contractual disputes; (7) tenure; (8) and certification, decertification, revocation, and suspension. (TE)

EMPLOYEES

Gail Paulus Sorenson

INTRODUCTION

This chapter analyzes more than 200 cases reported in 1986 involving precollegiate, public-sector employees. The review is comprehensive, excluding only those cases dealing with criminal and purely procedural issues, employment and unemployment benefits, and those cases found elsewhere in the *Yearbook:* tort cases involving employees and those focusing on collective bargaining. Also included in this chapter, where appropriate, are relevant 1986 Supreme Court cases from outside the field of education, as well as leading cases from prior years.

DISCRIMINATION IN EMPLOYMENT

Employment discrimination can be based on a multitude of factors and is prohibited by various, often overlapping, state and federal constitutional and statutory provisions. Many types of employment discrimination are prohibited by federal laws that extend to all institutions that receive federal financial assistance or that were passed pursuant to the authority of the thirteenth and fourteenth amendments to the Constitution. Title VII of the Civil Rights Act of 1964[1] covers discrimination based on race, color, religion, sex, and national origin (but not alienage) in both public and private institutions. Title IX of the Education Amendments of 1972 also prohibits sex discrimination (against employees and others) in educational institutions that receive federal aid;[2] and sex discrimination in the payment of wages is prohibited by the Equal Pay Act of 1963.[3] Age discrimination is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA),[4] which was recently amended to remove the upper age limit, thus extending protection to most workers from age forty onward.[5]

1. 42 U.S.C. § 2000 *et seq.*
2. 20 U.S.C. § 1681 *et seq.*
3. 29 U.S.C. § 206 (d)(1).
4. 42 U.S.C. § 1601 *et seq.*
5. Age Discrimination in Employment Amendments o. 1986, Pub. L. No. 99-592, 1986 U.S. Code Cong. & Ad. News (Vol. 10A). The only exception to removal of the upper age limit (not relevant here) is that tenured college and university faculty may still face mandatory retirement at age 70, an exception that is scheduled for repeal at the end of 1993.

"Otherwise qualified handicapped individuals" are protected from employment discrimination, perpetrated by federally aided institutions, under section 504 of the Rehabilitation Act of 1973 (section 504).[6] And those discriminated against because of alienage are protected, not by title VII, but by a civil rights statute known as section 1981,[7] which also protects against race discrimination in the making and enforcing of contracts; alienage discrimination would also be actionable under the Constitution's equal protection clause.

For those individuals who feel they have been subjected to employment discrimination based on some factor other than those enumerated above, they may be protected by the fourteenth amendment to the U.S. Constitution which prohibits states from denying to individuals the equal protection of the laws. Illustrating this type of case is a federal district court decision holding that a candidate for the office of regional superintendent of schools was denied equal protection by the operation of a state statute. The statute required that two of the previous four years of teaching experience be within the state. Although the regulation was intended to insure familiarity with the state's school code, evidence showed that it was not rationally related to achieving its purpose; the state's own teachers were not familiar with the school code and such a requirement was not mandated for the higher position of state superintendent, suggesting that it was an unnecessary requirement in any event. On the other hand, "not every difference in the treatment of public employees 'rises to the level of a constitutional deprivation,'"[8] as illustrated by a case where a teacher's aide was one of a small group that was not rehired, allegedly because of a minor complaint she made to a board member. The basis for the alleged discriminatory treatment was that she complained, while others did not.

Race

In 1986's leading case on discrimination based on race, the Supreme Court, in *Wygant v. Jackson Board of Education*,[9] gave further guidance on the permissible boundary of legitimate affirmative action. In a plurality decision, joined in full by only three justices, the Court struck down an affirmative action plan promulgated by the Jackson, Michigan, Board of Education and the Jackson Education Association. Because of "racial tension in the community that extended to its schools," a collective bargaining agreement was entered into in 1972 that provided for any necessary layoffs to be made by considering both minority status

6. 29 U.S.C. § 794 *et seq.*
7. 42 U.S.C. § 1981.
8. Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986).
9. 106 S. Ct. 1842 (1986).

and seniority: "teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel [Black, American Indian, Oriental, or Hispanic][10] laid off than the current percentage of minority personnel employed at the time of the layoff."[11] Several years later, adherence to this agreement resulted in nonminority teachers with greater seniority being laid off while minority teachers with lesser seniority were retained, this, in turn, prompted judicial action.

In determining whether the agreement violated the equal protection clause, the Court stated that all classifications based on race and ethnicity are inherently suspect, even when "the challenged classification operates against a group that historically has not been subject to governmental discrimination."[12] Such classifications must be justified by a compelling governmental interest and narrowly tailored to achieve that interest. Rejecting the proferred justification of statistical disparities in the workforce resulting from "general societal discrimination" (and not from prior discrimination by the school district itself), the Court said that even if a compelling purpose for the agreement could be shown to exist, there were other problems with the policy. In a part of the opinion joined by ony three justices, it was concluded that the policy imposed a burden that was "too intrusive" and not narrowly tailored:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of future employment opportunity is not as intrusive as loss of an existing job.[13]

Although Justice O'Connor, in a concurring opinion, felt that it was unnecessary to "resolve the troubling questions of whether any layoff provision could survive strict scrutiny,"[14] she did agree that the affirmative action provision was not narrowly tailored to effect a remedial purpose.[15] The four dissenters believed that justification for the affirmative action agreement was "found in the turbulent history of the effort to integrate the Jackson Public Schools,"[16] and in the

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10. "Minority group personnel" were defined in this manner in the collective bargaining agreement. *Id.* at 1845 n.2.
11. *Id.* at 1845.
12. *Id.* at 1846, *citing* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), among other cases.
13. *Id.* at 1851.
14. *Id.* at 1857, O'Connor, J., concurring.
15. *Id.*
16. *Id.* at 1863. Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting.

"unquestionably legitimate" effort to achieve and maintain a multiethnic faculty.[17] Nor did they believe that the chosen plan was anything but narrowly tailored to achieve important governmental objectives. Given the necessity for the unavoidable hardship of layoffs, a hardship that would affect minority and nonminority alike, the dissenters believed that the plan did not violate equal protection and was arrived at through fair procedures.

Standing in contrast to the affirmative action case considered above is an Eleventh Circuit Court of Appeals case evidencing classic, blatant, and invidious discrimination against a black male teacher, which resulted in an award of over $145,000 in damages.[18] The court held that there was substantial direct and circumstantial evidence to prove that the plaintiff, a teacher with a master's degree in educational administration, had been intentionally discriminated against when, on several occasions, he was not promoted to an administrative position. Additionally, white persons with lesser qualifications and shorter tenure had been promoted, two superintendents testified that race was a factor in personnel decisions (in part because superintendents who did the appointing had to consider community sentiment in order to be reelected to their positions), and qualifications for administrative positions were lowered so that three otherwise unqualified whites could be hired. Rejected as a pretextual defense for the plaintiff's lack of appointment to a particular principalship was the assertion that "white teachers would not accept [the plaintiff's] leadership." Shortly thereafter, the plaintiff had been elected president of the overwhelmingly white teachers union. Because intentional discrimination had been proven under title VII, section 1981, and section 1983 (which bars the state from violating federal constitutional and statutory rights),[19] plaintiff was properly awarded back pay, compensatory damages for proven humiliation and emotional distress, and punitive damages against one superintendent who preselected a white individual for a high school principalship and then conducted a sham search.

In another Eleventh Circuit case, a black male math teacher was awarded back pay and an order to appoint him to a principalship when intentional racial discrimination was proven: the school board breached a predetermination settlement agreement (reached with the help of the EEOC under a title VII complaint) when it failed to appoint the teacher to the first available administrative vacancy.[20]

Two additional cases illustrate that white persons working in

17. *Id.* at 1868, Stevens, J., dissenting.
18. Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).
19. 42 U.S.C. § 1983.
20. Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515 (11th Cir. 1986).

predominately black institutions also may achieve protection from racially motivated discrimination under federal constitutional and statutory provisions. In one case, a white female director of a federally funded Head Start Program successfully proved race discrimination under title VII after she was forced to resign, was replaced by a black person, and no legitimate nondiscriminatory reason was given.[21] Back pay and either reinstatement to a comparable position or front pay were awarded, along with attorneys fees. Likewise, a white, male coach/athletic director was able to prove that his transfer was discriminatory by putting forth evidence that the principal at a predominantly black, urban school favored black coaches.[22]

About twice as many teachers, both white and black, were unsuccessful in asserting race discrimination claims in 1986 as were successful. In one Eighth Circuit case, although the court saw some evidence of discrimination against a black assistant principal who had defended black children, it declined to find the lower court's no-discrimination decision erroneous where there were "two permissible views of the evidence."[23] Citing *Anderson v. City of Bessemer City,*[24] it was emphasized that a reviewing court cannot reverse a plausible decision simply because it sees things differently. The Eighth Circuit declined to find a second lower court decision "clearly erroneous" where a white female was selected head special education teacher over a black male teacher, who then alleged discrimination.[25] Evidence suggested that the white female was selected because of prior experience as a head teacher and higher evaluations. And, in the final Eighth Circuit case, a dismissal was affirmed where a black male teacher sought to sue his accusors for intentional infliction of emotional distress when the underlying claim that he had been fired because of his race had already been litigated: "Yancy had his day in court."[26]

In the Second Circuit, a white Jewish school administrator claimed that the promotion of Hispanics and Italians presented evidence of race discrimination in violation of title VII and section 1981.[27] The court affirmed the lower court's decision that the board's failure to promote the plaintiff was based on legitimate reasons of qualification and merit. Race discrimination also was not proven where a black principal failed promptly to report two incidents of sexual misbehavior between students and overlooked the theft of a basketball backboard; further-

21. Carter v. Community Action Agency, 625 F. Supp. 199 (M.D. Ala. 1985).
22. Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).
23. Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985).
24. 105 S. Ct. 1504 (1985).
25. Nelson v. Pulaski County Special School Dist., 803 F.2d 961 (8th Cir. 1986).
26. Yancy v. McDevitt, 802 F.2d 1025 (8th Cir. 1986).
27. Krulik v. Board of Educ., 781 F.2d 15 (2d Cir. 1986).

more, three out of the four "voluntarily reassigned" principals were white.[28]

In the final cases in this section, one plaintiff did not establish a prima facie case of discrimination because he failed to show that his discipline was disporportionate: he was told by the board to undergo psychiatric evaluation following sexual advances toward students that the plaintiff said were "directed by a voice in his mind."[29] Another teacher failed to prove that she had standing to bring a race discrimination suit.[30] In the latter case, pursuant to a policy allowing only teachers and administrators living outside the district to enroll their children in the district where they worked, a white cafeteria worker was told she could no longer enroll her child, just after a black custodian was denied the same privilege. Although the plaintiff alleged that she was discriminated against under title VII as a "result of race, in the furtherance of discrimination against another individual,"[31] the only injury to her was an economic one, not based on race. The court explained that in order to assert the rights of a third party, one must allege a "work environment" or "associational" injury (i.e., that one is an employee and had a right to work in an environment free of race discrimination against others, or that one has been deprived of the right to associate with another person because of that person's race).

Religion

In 1972, section 701(j) was added to title VII of the Civil Rights Act of 1964[32] to require that an employer "reasonably accommodate . . . an employee's . . . religious observance or practice," if such accommodation can be made "without undue hardship on the conduct of the employer's business." In its first interpretation of this section, in *Trans World Airlines, Inc. v. Hardison* (1977),[33] the Supreme Court said that employers have no duty to accommodate when to do so would result in "undue hardship," which the Court defined as "more than a *de minimis* cost" to the employer. In 1986, the Supreme Court issued its second opinion on employers' obligations under this provision of title VII: the issue was not "undue hardship" but rather "reasonable accommodation."

Ansonia Board of Education v. Philbrook[34] involved a high school business teacher whose membership in the Worldwide Church of God

28. Morgan v. South Bend Community School Corp., 797 F.2d 471 (7th Cir. 1986).
29. Crawford v. Charlotte-Mecklenburg Bd. of Educ., 641 F. Supp. 571 (W.D.N.C. 1986).
30. Clayton v. White Hall School Dist., 778 F.2d 457 (8th Cir. 1985).
31. *Id.* at 459.
32. 42 U.S.C. § 2000e(j).
33. 432 U.S. 63 (1977).
34. 107 S. Ct. 367 (1986).

required him to refrain from working on holy days, approximately six of which occurred during the school year. Pursuant to the collective bargaining agreement, teachers were permitted to use three days leave a year for mandatory religious holidays, and several days for other specified events (e.g., five days for a death in the family and one day for a wedding). In addition, teachers were permitted to take three days of leave for "necessary personal business," but could not use those days for events which were specified in other portions of the contract (e.g., they could not be used for weddings or religious holidays). Because the school board would not permit the teacher in question, Mr. Philbrook, to use his personal days for religious reasons or to pay for the cost of a substitute (and receive his full pay for those days), he had to take a leave without pay for approximately three days of religious holiday observance.

The Supreme Court rejected the court of appeal's conclusion[35] that an employer should be required by section 701(j) to accept an employee's reasonable accommodation proposal. The Court made clear that the statutory requirement, "[by] its very terms . . . directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."[36] The employer need not demonstrate that alternatives proposed by employees would result in undue hardship. Because the majority of the Court did not know if the personal days leave policy was actually used for limited purposes or whether it was open-ended, as alleged by Phillbrook, it remanded the case to the district court to determine if the board's accommodation was, in fact, reasonable. Although an employer may have no obligation to provide for paid leave, once the choice is made to do so, "unpaid leave [would not be] a reasonable accommodation when paid leave is provided for all purposes *except* religious ones."[37]

Sex

The year's leading case on sex discrimination occurred outside the field of education, but has direct implications for education at all levels. In *Meritor Savings Bank, FSB v. Vinson*,[38] the Supreme Court held that claims for sexual harassment can be brought under title VII even though "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[39] are not "directly linked

35. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985). See discussion of this opinion in the *Yearbook of School Law 1985* at 5-6.
36. Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. at 372.
37. *Id.* at 373.
38. 106 S. Ct. 2399 (1986).
39. 29 C.F.R. § 1604.11(a).

to the grant or denial of an economic *quid pro quo*." The Court thus made clear that there are two types of sexual harassment: that based on a "*quid pro quo*" and that based on a "hostile environment": "[A] plaintiff may establish a violation of [t]itle VII by proving that discrimination based on sex has created a hostile or abusive work environment."[40] It cautioned, however, that a claim of sexual harassment would not be actionable unless it was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[41]

The Court also said that "voluntary" sex-related conduct by the plaintiff will not necessarily preclude a finding that the sexual advances were "unwelcome." This determination, while difficult, will turn on the credibility of witnesses and evidence. Furthermore, evidence of a plaintiff's sexually provocative speech or dress was held relevant to the issue of whether the sexual advances were unwelcome.

On the issue of employer liability, *Vinson* made clear that while an employer is not automatically liable for harassment perpetrated by its supervisors and employees, "absence of notice . . . does not necessarily insulate that employer from liability."[42] The Court suggested that nondiscrimination policies should address themselves specifically to sexual harassment and should include an effective grievance procedure, one that accounts for the possibility of harassment arising at any level of the employment hierarchy.[43]

Representing a relatively new development in sex discrimination litigation, a *male* plaintiff alleged sex and age discrimination when he was not hired as a general science teacher, in favor of a younger woman.[44] The court held that plaintiff's own pleadings established that he was not qualified for the position by reason of severe and documented mental disability.

Also unsuccessful were several female plaintiffs. In one case, a teacher was granted unpaid maternity leave for the second semester and was thereafter denied disability leave (with pay) when she, in fact, became disabled during the period of her leave.[45] Since she had made a choice to take unpaid maternity leave, she could not thereafter assert a right to paid sick leave, even though she might have taken the sick leave if she had not already begun her maternity leave. The court held that there was no evidence that pregnancy-related disability was treated any

40. *Id.* at 2405-06.
41. *Id.* at 2406 (citations omitted).
42. *Id.* at 2408 (citation omitted).
43. *See id.* at 2408-2409.
44. Froneberger v. Yadkin County Schools, 630 F. Supp. 291 (M.D.N.C. 1986).
45. West Hempstead Union Free School Dist. v. State Div. of Human Rights, 497 N.Y.S.2d 721 (App. Div. 1986).

differently by the district than any other disability. A second teacher was denied credit toward tenure for seven months of maternity leave, while others with disabilities were not denied such credit.[46] The court held that title VII was inapplicable to her situation because it had not been extended to cover states or political subdivisions at the time the credit was disallowed, and it had no retroactive effect. A third female teacher's title VII claim was unsuccessful despite the fact that a younger male teacher (with slightly less experience) was hired for an English position, in part, because of his coaching abilities.[47] The court held that proof that coaching skills played a part in the decision was insufficient to establish discrimination.

In a case that demonstrates the difficult burden faced by those who appeal the denial of their discrimination claims, an additional female alleging sex discrimination was unsuccessful.[48] Although the female teacher had a master's degree and was more than minimally qualified for two administrative positions filled by males with only minimum qualifications, a federal court of appeals held that the evidence was "not clearly erroneous" that she was passed over because of legitimate, subjective personality factors. On the other hand, where a lower court had determined that there was a pattern of discrimination in a district, an appeals court remanded the case for a determination as to whether a female assistant director of transportation was, in fact, discriminated against when a male from outside the district was hired as director.[49] The court also determined that one of the district court's conclusions was clearly erroneous: the school district's reason for the decision was not pretextual, *viz.*, that the investigation of alleged improprieties committed by the former director made an outside candidate the preferable choice. An additional two decisions supporting sex discrimination against females were affirmed: the explanation of why a less qualified male was hired was "unworthy of credence,"[50] and a female who suffered sex and age discrimination was entitled to front pay and $5,000 for mental anguish.[51] And, in a decision discussed more fully in the "privacy" section, a federal district court held that a district had violated title VII and the Constitution by forcing a pregnant unmarried teacher to take a leave of absence.[52]

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46. Schwabenbauer v. Board of Educ., 777 F.2d 837 (2d Cir. 1985).
47. Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985).
48. McCarthney v. Griffin-Spalding County Bd. of Educ., 791 F.2d 1549 (11th Cir. 1986).
49. Wardwell v. School Bd., 786 F.2d 1554 (11th Cir. 1986).
50. Smithtown Cent. School Dist. v. Beller, 502 N.Y.S.2d 781 (App. Div. 1986).
51. Wantagh Union Free School Dist. v. New York State Div. of Human Rights, 505 N.Y.S.2d 713 (App. Div. 1986).
52. Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986).

Among three wage dispute cases, a female food service coordinator was awarded back pay when her salary was reduced more than $2,000 following decertification of her position from the bargaining unit.[53] Evidence showed that the male managerial employees whose positions were decertified (the supervisor of maintenance and the supervisor of custodians) received salary increases. Two other claims of wage discrimination failed.[54]

National Origin

Like last year, discrimination based on national origin was the subject of only two reported cases. In one, a federal appeals court held that there was sufficient evidence to support the finding that a teacher's nonrenewal was based on incompetence rather than discrimination on the basis of East Indian Hindu origin.[55] In the other, the court held that an employment discrimination claim based on the plaintiff's Greek ancestry was timely filed under title VII and the equal protection clause, illustrating two major avenues for redress of alleged national origin discrimination.[56] There were no reported cases of alleged discrimination because of *association* with people of foreign national origin.[57]

Age

In actions under the Age Discrimination in Employment Act (ADEA),[58] a female plaintiff prevailed because of age and sex discrimination,[59] a male lost because he clearly was not qualified for the position for which he applied,[60] and two administrators prevailed because of age discrimination alone.[61] In the latter case, for reasons of financial exigency, plaintiffs were chosen for reassignment to teaching positions because they had given notice of intent to retire at the end of the year

53. Williamsburg Community School Dist. v. Commonwealth, 512 A.2d 1339 (Pa. Commw. Ct. 1986).

54. Smith v. Bull Run School Dist. No. , 772 P.2d 27 (Or. Ct. App. 1986) (new teachers were paid more because of better qualifications and because of the need to entice them to rural area); Jennings v. Tinley Park Community Consol. School Dist. No. 146, 795 F.2d 962 (7th Cir. 1986) (custodians [all male], but not secretaries [all female], legitimately were paid overtime because it was necessary for them to work overtime, while secretaries could postpone extra work).

55. Hemmige v. Chicago Pub. Schools, 786 F.2d 280 (7th Cir. 1986).

56. Photos v. Township High School Dist. No. 211, 639 F. Supp. 1050 (N.D. Ill. 1986).

57. For a case of this type, see last year's *Yearbook* at 7.

58. 29 U.S.C. § 621 *et seq.*

59. Wantagh Union Free School Dist. v. New York State Div. of Human Rights, 505 N.Y.S.2d 713 (App. Div. 1986).

60. Froneberger v. Yadkin County Schools, 630 F. Supp. 291 (M.D.N.C. 1986).

61. Equal Employment Opportunity Comm'n v. Community Unit School Dist. No. 9, 642 F. Supp. 902 (S.D. Ill. 1986).

following reassignment. "[N]otification of intent to retire is so inexorably linked with age that it cannot be viewed as a separate factor" upon which to base a reclassification that was, in effect, a demotion even when done to "maintain continuity,"[62]

Another ADEA case made clear that the Act reaches disparate impact claims (i.e., that intentional discrimination on the basis of age need not be shown), but denied relief because older teachers did not suffer discrimination by the implementation of a new salary system intended to decrease an ever-increasing disparity between older higher paid employees and younger lower paid employees.[63] The new plan was based on reasonable factors other than age.

Handicap

In two cases alleging handicap discrimination under state law, neither plaintiff was successful. In the first, a long-time teacher of severely and profoundly handicapped students was not discriminated against when he was discharged for inability to teach effectively and safely.[64] Due to a degenerative eye disease, the teacher had become legally blind, which made his ability to cope with a prior hearing disability even more difficult. The court held that discrimination does not exist where disability prevents "proper performance" and where the employee cannot be accommodated without undue hardship; state law did require, however, that the employee be accommodated, if possible, in a nonteaching position for which he was qualified. In the second state-law case tracking section 504 of the Rehabilitation Act of 1973,[65] a data processing department programmer had a "personality disorder" that resulted in his being chronically late for work.[66] The court upheld his dismissal, ruling that he was not "disabled" because the disorder did not limit major life activities. Furthermore, the district had no duty to reasonably accommodate him or to demonstrate that the disorder interfered with the performance of his job.

SUBSTANTIVE CONSTITUTIONAL RIGHTS

The constitutional rights reviewed in this section include the first amendment rights of freedom of speech, association, and free exercise of religion; as has been true for several years, free speech cases predominate. Also reviewed are cases concerning the right to privacy,

62. *Id.* at 905.
63. Equal Employment Opportunity Comm'n v. Governor Mifflin School Dist., 623 F. Supp. 734 (D.C. Pa. 1985).
64. Clarke v. Shoreline School Dist. No. 412, 720 P.2d 793 (Wash. 1986).
65. 29 U.S.C. § 794 *et seq.*
66. School Dist. v. Friedman, 507 A.2d 882 (Pa. Commw. Ct. 1986).

where a notable increase in litigation has occurred, and cases alleging a violation of substantive due process (i.e., that state actions or policies are arbitrary or unfair in substance).

Speech

In a Supreme Court decision, *Memphis Community School District v. Stachura*, the Court reversed and remanded for a new trial a case where a teacher was successful in claiming a denial of free speech and due process rights. The new trial was to be limited solely to the issue of compensatory damages.[67] The Court held that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages . . . ."[68] The teacher had been awarded $46,000 in punitive damages and $275,000 in compensatory damages for his suspension from teaching, even though he had continued to receive his salary at all times during the controversy. The problem arose following community complaints about his use of sex education teaching materials, most of which had been approved in advance. Another case focusing on remedies for denial of free speech rights held that federal courts have the power to order reinstatement where "malicious intent to cause a deprivation of plaintiff's constitutional rights exists."[69] (The plaintiff had supported a rival school board candidate in opposition to the incumbent.)

In a unique free speech case, seven elementary school teachers claimed they had a free speech right to hold prayer meetings, in school, before classes began on Tuesday mornings.[70] The Seventh Circuit held that despite the fact that no students participated in the meetings and the meetings were not disruptive, the school had the right to avoid controversy and distraction by limiting the few meetings that were held before school to those that were work-related. The appeals court accepted the finding of the district court that no public forum had been created, and held that government can regulate content in a nonpublic forum. "[S]ince a school is not a traditional public forum like the streets or parks, the plaintiff had to show that the officials in charge of it made it a public forum."[71] The simple fact that the school had no articulated policy on the matter did not create a public forum.

A school parking lot also was held to be a nonpublic forum in a case involving the alleged right of a nonemployee to distribute flyers on behalf of a rival union.[72] In a similar case, there was no denial of free

67. Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).
68. *Id.* at 2545.
69. Banks v. Burkich, 788 F.2d 1161 (6th Cir. 1986).
70. May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986).
71. *Id.* at 1118.
72. Grattan v. Board of School Comm'rs, 805 F.2d 1160 (4th Cir. 1986).

speech rights when a teachers organization was denied access to schools during school hours, and to school mail facilities; however, prohibiting teachers within the school from discussing the organization, mentioning it in private mail communications, and using billboards dedicated to the personal-message use of teachers did violate the teachers' free speech rights.[73]

There were several cases reported in 1986 where adverse employment actions allegedly resulted from the protected free speech activities of employees. An Eleventh Circuit case illustrates that the initial determination, *viz.*, whether the speech is a matter of public concern rather than private grievance (under the *Connick* doctrine),[74] is a matter of law.[75] There, a high school history and science teacher spoke out against allowing students to choose their subjects and teachers ("collegiate registration") and out-of-field placement of physical education teachers and coaches in social studies positions—a practice he said contributed to "civic illiteracy." Rejecting the notion that all issues relating to public education are matters of public concern, the court looked at the content, form, and context of the speech and found that the teacher was primarily concerned about the discipline problems in his own classes arising from collegiate registration and about his own course assignments. Therefore, the court affirmed the summary dismissal of the teacher's claim, concluding that the speech could not "fairly be characterized as constituting speech on a matter of public concern."[76] Also not constituting matters of public concern were complaints made to a board member about the late arrival of reading materials,[77] a principal's statements to the board criticizing the superintendent for past actions and opposing the transfer of his wife from a senior high school position to a junior high position,[78] and a teacher's posting of letters on parents' night concerning a problem she was having with administrators.[79]

Speech was held to be a matter of public concern where a teacher criticized the abandonment of ability grouping and other policies and procedures relating to the educational function of the school;[80] where a coach said that few of his high school athletes could meet NCAA

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73. Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).

74. *See* Connick v. Meyers, 461 U.S. 138 (1983).

75. Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

76. *Id.* at 1516.

77. Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986).

78. Lewis v. Harrison School Dist. No. 1, 621 F. Supp. 1480 (D. Ark. 1985).

79. Alinovi v. Worcester School Comm., 777 F.2d 776 (1st Cir. 1985). For further discussion of this case, see the "privacy" section.

80. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668 (8th Cir. 1986).

eligibility requirements, which was a matter of concern to the community;[81] where a teacher filed a grievance concerning high faculty turnover and sexual harassment of teachers and students;[82] where a permanent substitute teacher spoke as a parent against the transfer of a social studies teacher to an English position;[83] and where a former teacher's aide answered questions posed by a school board member regarding a budget controversy that had split the board.[84]

Legitimate, nondisciplinary transfers, or other adverse employment actions, sometimes can be made when teaching effectiveness is impaired because of otherwise protected speech. Illustrating such a situation is a case where a teacher who taught all lower grades in a small rural school district was transferred after filing a child-abuse report that caused widespread parental controversy.[85] Because the transfer was not for punishment, the court held that the teacher's free speech rights had not been violated.

Association

The first case in this section illustrates the application of analyses developed in the free speech context to a complaint alleging denial of freedom of association. A former teacher's aide failed to show that her nonrenewal infringed her right to free association because the decision not to rehire her was made prior to her alleged "fraternization" with work release prisoners who were working on the campus of her school.[86] Furthermore, the school board had a "strong interest" in prohibiting the social contact in question and such conduct, in any event, did not involve matters of public concern. In another case, a teacher with "eighteen years of exemplary service" was discharged (without a hearing) and her teaching certificates were cancelled for alleged misconduct.[87] The court, however, determined that the adverse employment actions were a result of the teacher's active political participation (in the context of a volatile political climate) and awarded the plaintiff $12,000 in back wages, $15,000 in actual damages for emotional and mental distress, and $10,000 punitive damages as a result of the defendant-superintendent's callous indifference to federally protected rights.

Religion

A controversy decided by a federal district court involved a

81. Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).
82. Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986).
83. Lees v. West Greene School Dist., 632 F. Supp. 1327 (W.D. Pa. 1986).
84. Brinkmeyer v. Thrall Indep. School Dist., 786 F.2d 1291 (5th Cir. 1986).
85. Raposa v. Meade School Dist., 790 F.2d 1349 (8th Cir. 1986).
86. Brew v. School Bd., 626 F. Supp. 709 (M.D. Fla. 1985).
87. Kercado Melendez v. Aponte Roque, 641 F. Supp. 1326 (D.P.R. 1986).

Catholic school teacher who was denied leave for religious holidays under the "family days" section of the collective bargaining agreement (which allowed religious leave where the religion required it, but not where such leave was based on personal desire); however, the teacher was permitted to take paid "personal leave" days, despite the fact that religious services were readily available during nonworking hours.[88] The court said that even though the teacher was "thereby deprived of a day's leave that he might have used otherwise," it was a minimal imposition not rising to the level of a constitutional (free exercise) violation. An employee who made his own decision regarding religious "leave" was dismissed for breach of contract because of four days of unexcused absences, which he used to attend a religious convocation.[89]

In an area where there is little judicial precedent, and ample disagreement on the appropriate application of principles, the Oregon Supreme Court decided a case concerning a special education teacher, Janet Cooper, who converted to the Sikh religion, changed her name to Karta Kaur Khalsa, and regularly wore a white turban and clothing to teach her sixth and eighth grade classes.[90] Under a limiting construction of a state law prohibiting teachers from wearing "any religious dress" while teaching, the court upheld the validity of the law (against both state and federal free exercise claims) and the validity of a corollary statute mandating the loss of state certification. Saying that teachers could disclose personal religious views but could not proselytize, could wear common religious decorations, and might even be able to wear religious "dress" occasionally, the court distinguished the unacceptable appearance of state support for religion suggested by condoning the frequent wearing of "dress" or "garb" (as opposed to decorations, like "a small cross or Star of David"). In addition, the court held that where the religious dress statute had been legally applied to effect a teacher's suspension, "disqualification from teaching in public schools [was] based on one's doing so in a manner incompatible with that function."[91]

Privacy

Illustrating the various legal protections available for decisions relating to marriage, or lack thereof, and childbearing, are three 1986 cases from federal district courts in Illinois and Virginia. Relying on

88. DiPasquale v. Board of Educ., 626 F. Supp. 457 (W.D.N.Y. 1985).

89. Neumzig v. Seaman Unified School Dist. No. 345, 722 P.2d 569 (Kan. 1986) (teacher was precluded from litigating religious discrimination claim before a state commission on civil rights because review had been under the teacher tenure act—proper appeal was to the judiciary).

90. Cooper v. Eugene School Dist. No. 4J, 723 P.2d 298 (Or. 1986).

91. *Id.* at 313.

Loving v. Virginia[92] and *Roe v. Wade*,[93] a federal district court in Illinois held that "it is beyond question that plaintiff had a substantive due process right to conceive and raise her child out of wedlock without unwarranted state (school board) intrusion."[94] Likewise, in Virginia, it was held that a pregnant unmarried teacher's title VII rights and her right to privacy were violated when she was forced to take a premature leave of absence.[95] "It is clear that the right to bear a child out of wedlock is protected by the Constitution,"[96] and that protecting schoolchildren from exposure to the teacher, if valid, is outweighed by the teacher's rights. And in Illinois, a court held that summary judgment was precluded where a male assistant principal alleged that his nonrenewal was based on his decision to marry one of the school's physical education teachers, contrary to the wishes of the principal.[97] The court called the right to marry "fundamental," although not linked to any particular constitutional provision; the court used string citations to document marriage as a "basic civil right."[98]

In the first decided case of mass drug testing of teachers, a New York court of appeals held that compulsory drug testing of probationary teachers who were about to be tenured (absent reasonable particularized suspicion) was a violation of the fourth amendment provision against unreasonable search and seizure.[99] In the absence of evidence of drug abuse, the required urine test was "an act of pure bureaucratic caprice."[100] Similarly, without deciding whether mandatory drug screening of school bus drivers and mechanics might be considered a reasonable search, a federal court held that the mandatory testing of a school bus attendant, without particularized probable cause, violated her fourth amendment rights.[101]

In the final case concerning privacy, a federal court of appeals rejected a teacher's argument that her privacy rights (specifically, her right to be free from unreasonable search and seizure) had been violated when she was forced to give her principal a case study paper she had written for a college course.[102] The paper, which discussed the educational needs of a handicapped student in the teacher's fourth grade class,

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92. 388 U.S. 1 (1967).
93. 410 U.S. 113 (1973).
94. Eckmann v. Board of Educ., 630 F. Supp. 1214, 1218 (N.D. Ill. 1986).
95. Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986).
96. *Id.* at 1061.
97. Hall v. Board of Educ., 639 F. Supp. 501 (N.D. Ill. 1986).
98. *Id.* at 512 n.15.
99. Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (App. Div. 1986).
100. *Id.* at 891.
101. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).
102. Alinovi v. Worcester Board Comm., 777 F.2d 776 (1st Cir. 1985).

contained criticisms of the principal's handling of the student's educational program. The court held that the teacher had no legitimate expectation of privacy in the paper because she had "voluntarily and unconditionally" given the paper to her professor and also to the school official responsible for a reevaluation of the student's program—a conclusion that also justified any disciplinary action that resulted from her initial refusal to turn over the paper.

Substantive Due Process

Violations of substantive due process are said to arise when state actions affecting property or liberty interests are arbitrary, capricious, or unfair in substance rather than lacking in procedural fairness and regularity. As an illustration, a court held that dismissal was not so disproportionate to the offense as to be "unduly unfair" where a bus driver, without checking a route sheet or a prekindergarten child's tag, dropped the child off at home rather than at a babysitter's house (two miles away).[103] Similarly, the dismissal of a tenured teacher for "various acts of misconduct" was held "not, under all of the circumstances, so disproportionate to the offenses in question as to shock one's sense of fairness."[104] In another case, Mississippi teachers claimed a denial of due process when their salaries were not increased as promised in a 1982 reform act.[105] Although the case report did not clearly state that the alleged wrong was one of substantive unfairness (e.g., that their salaries were capriciously kept low, as inferred here), the case was nevertheless dismissed as barred by the eleventh amendment, which prohibits federal court suits against states without their permission. One teacher was successful in proving that her dismissal was arbitrary, capricious, and discriminatory because of evidence of bias on the part of a majority voting for dismissal.[106]

In addition to the type of substantive due process claim illustrated above, substantive due process claims sometimes are based on the alleged denial of a nonexplicit liberty right (especially the right to privacy). An illustration of this type of claim is the Illinois case noted in the previous section, where the court found a substantive due process right to conceive and bear a child out of wedlock.[107]

PROCEDURAL DUE PROCESS

In order for employees to be entitled to procedural due process

103. Tyson v. Hess, 498 N.Y.S.2d 779 (1985).
104. Kaczala v. Board of Educ., 507 N.Y.S.2d 38 (App. Div. 1986).
105. Mohler v. Mississippi, 782 F.2d 1291 (5th Cir. 1986).
106. Leola School Dist. v. McMahan, 712 S.W.2d 903 (Ark. 1986).
107. Eckmann v. Board of Educ., 630 F. Supp. 1214 (N.D. Ill. 1986).

when adverse employment actions are threatened, it is necessary to show the deprivation (by government action or policy) of a "liberty" or "property" interest. Property interests often arise when an employee claims a legitimate entitlement to a particular position, and liberty interests arise when a government action threatens to damage an individual's reputation, thus foreclosing a range of future employment opportunities.

Although the nature of due process varies with the scope of the entitlement and the extent of the deprivation, the Supreme Court has made clear that "notice and an opportunity to respond" are "essential requirements of due process."[108] Because a hearing must be provided before employees are deprived of significant property interests,[109] suspensions made necessary by emergency situations must be with pay. While the general rule requires that due process precede adverse employment actions, in emergency situations due process should follow as soon as possible. A public employee under contract, or protected by statutory pretermination rights, is entitled to minimum due process (at least): "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[110] On the other hand, in many states, "[i]t is well settled that a probationary employee may be discharged [at the end of a term contract] without a hearing and without a statement of reasons . . . ."[111]

Illustrating the importance of raising all relevant legal issues in the initial stages of any employee-employer controversy is a case where an elementary school principal, in essence, may have "waived" his due process rights.[112] The principal, who was dismissed for supervising a child's father as the father beat the child in front of other students, was precluded from raising the alleged denial of due process in federal court because he had not raised the issue in prior state administrative and judicial proceedings.

Liberty and Property Interests

Several cases reported in 1986 illustrate that not every deprivation or injury implicates liberty or property interests. Even though residents were upset with the nonrenewal of a junior high school principal, it was held that "the simple non-renewal of a single, one-year contract,

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108. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1495 (1985).
109. *Id.* at 1493 (citations omitted).
110. *See id.* at 1495.
111. Dillard v. Alvarado, 500 N.Y.S.2d 4, 5 (App. Div. 1986). *See also* Cardo v. Board of Educ., 503 N.Y.S.2d 122 (App. Div. 1986) (nontenured teacher not entitled to hearing prior to termination).
112. Sharpley v. Davis, 786 F.2d 1109 (11th Cir. 1986).

standing alone, will not constitute a matter of local controversy" sufficient to require a hearing under state law.[113] Similarly, the nonrenewal of a teachers aide did not implicate due process,[114] nor the nonrenewal of a one-year temporary teaching certificate,[115] nor the failure to promote or tenure.[116]

Several cases illustrate that the creation of property rights is very much dependent on state law. While the failure to offer a high school girls' basketball coach a position for the following year created no statutory entitlement to due process in Minnesota,[117] a similar situation did create such a right in West Virginia.[118] Analogously, although a contract van driver in Ohio was held not protected by civil service statutes requiring due process before termination (nonrenewal),[119] a New York City bus driver, employed by a private company to transport handicapped children to school, had a property interest in his employment pursuant to an agreement between his company and the NYC Board of Education: drivers could only be disqualified for "just cause."[120] Illustrating the usual rule for extracurricular assignments, a teacher was not entitled to due process when he was relieved of his responsibilities as a part-time advisor of the Young Farmers Program.[121] Because he was not a "professional employee" while performing his supplemental duties, he had no property right under state law.

In a federal court case, a teacher claimed denial of procedural due process under the fourteenth amendment when her term contract was not renewed without a notice of reasons as required by the Texas Term Contract Nonrenewal Act.[122] While leaving open the possibility of a state law claim, the federal court held, in an unusual opinion, that "violation of state procedures for nonrenewal . . . does not create a property interest for federal due process purposes."[123] While the court was no doubt correct in reasoning that the Act "was not intended to create a property interest in continued employment,"[124] the Act does

113. Dalton City Bd. of Educ. v. Smith, 349 S.E.2d 458 (Ga. 1986).
114. Brew v. School Bd., 626 F. Supp. 709 (M.D. Ga. 1985).
115. Hemmige v. Chicago Pub. Schools, 786 F.2d 280 (7th Cir. 1986).
116. Photos v. Township High School Dist. No. 211, 639 F. Supp. 1050 (N.D. Ill. 1986) (no legitimate expectation of promotion); Sherrod v. Palm Beach County School Bd., 620 F. Supp. 1275 (N.D. Fla. 1985) (despite promise that teacher would be "recommended for tenure if he maintained a high level of professionalism," his expectation of tenure did not create a property right).
117. *In re* Hahn, 386 N.W.2d 789 (Minn. Ct. App. 1986).
118. Smith v. Board of Educ., 341 S.E.2d 685 (W. Va. 1985).
119. Deryck v. Akron City School Dist., 633 F. Supp. 1180 (N.D. Ohio 1986).
120. Stein v. Board, 792 F.2d 13 (2d Cir. 1986).
121. Bravo v. Board of Directors, 504 A.2d 418 (Pa. Commw. Ct. 1986).
122. Cogdill v. Comal Indep. School Dist., 630 F. Supp. 47 (W.D. Tex. 1985).
123. *Id.* at 49.
124. *Id.* (by implication).

appear to create an entitlement to continued employment absent notice of reasons for nonrenewal (despite the fact that this state-created right is not required for a simple nonrenewal by federal due process). As a general rule, federal courts will require strict adherence to state-created procedural mandates.

Aspects of Notice

In those situations where due process is required, it is necessary that employees potentially subject to adverse employment actions have actual notice (or that proof of waiver of notice can be shown) and that the notice be sufficiently detailed to allow the employee to prepare an adequate response. Cases reviewed here illustrate that a note with only the date and time of the hearing was inadequate;[125] that a teacher faced with dismissal for insubordination, failure to report to work without appropriate approval for absence, and other due and sufficient cause was not provided with a fair summary of the reasons and evidence for dismissal;[126] and that cases may have to be reversed where a reviewing court cannot tell if sufficiently detailed notice was given.[127] Several additional cases illustrate that the notice must be timely.[128]

That the extent of due process is often determined by state law is illustrated by a case involving a South Carolina statute that authorized immediate dismissal (with prior notice and opportunity for a hearing), but did not require written notice nor an opportunity for remediation, when the charge was "evident unfitness."[129] In New York State, a bus driver's conference with her supervisor on the day of her dismissal, followed by a hearing thereafter, was held sufficient to satisfy due process.[130]

Aspects of Hearing

Employees successfully challenged aspects of the hearing process in

125. Stein v. Board, 792 F.2d 13 (2d Cir. 1986).

126. Zanavich v. Board of Educ., 513 A.2d 196, 197 (Conn. App. Ct. 1986).

127. *See* Wells v. Dallas Indep. School Dist., 793 F.2d 679 (5th Cir. 1986).

128. Salinas v. Central Educ. Agency, 706 S.W.2d 791 (Tex. Civ. App. 1986) (notice and hearing must precede adverse employment action); Koerner v. Joppa Community High School Dist. No. 21, 492 N.E.2d 1017 (Ill. App. Ct. 1986) (dismissal ineffective where notice not given within 60-day statutory period); Steinway v. Board of School Trustees, 486 N.E.2d 1045 (Ind. Ct. App. 1985) (written notification of intent to dismiss required not more than 40 nor less than 30 days prior to consideration); Kehoe v. Brunswick City School Dist. Bd. of Educ., 493 N.E.2d 261 (Ohio Ct. App. 1983) (timely notice of intent not to reemploy waived by acceptance of position as substitute teacher); Miller v. Culver Community Schools Corp., 493 N.E.2d 181 (Ind. Ct. App. 1986) (receipt of timely notice supported by evidence where secretary testified notice was on principal's desk).

129. Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 340 S.E.2d 144 (S.C. 1986) ("evident unfitness" demonstrated by, *inter alia*, obstructing medical aid to student who had miscarriage in school).

130. Tyson v. Hess, 497 N.Y.S.2d 779 (1985).

several cases in 1986. In addition to the lack of a pretermination hearing before the summary dismissal of a bus attendant (as a result of one unconfirmed positive drug test), a District of Columbia federal court ruled that consideration of the employee's written submissions (as opposed to an oral defense) did not provide the employee with an adequate post-termination hearing.[131] Due process also was denied to two janitors who were given a hearing where there were no sworn witnesses and no written record;[132] where no hearing was provided to an assistant principal before "termination," though it was plainly required by state statute (even though the "termination" was intended to be a "nonrenewal");[133] where a teacher's proposed findings of fact were disregarded by the board, in violation of state law;[134] and where a tenured teacher was dismissed without a statutorily required hearing either prior to termination or within four months thereafter.[135]

Courts determined that due process rights were not violated (1) when evidence that went beyond the scope of the charges was introduced at a hearing, but was not considered in dismissing an athletic director;[136] (2) when a board chairperson's statement prior to the hearing that "it would be best for [the director] to go" was held insufficient to show bias;[137] (3) where the record did not show improper influence by an attorney representing the board in a dismissal proceeding;[138] and (4) where a supervisor of maintenance was told of his termination (to be effective at a later date) before he had a hearing (harmless procedural error).[139]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

The criteria and procedures for public employee discipline are largely derived from state statutes, local school board policies, and local contract provisions. As long as minimum constitutional due process procedures are followed, the dismissal of tenured teachers, as well as those under term contracts, is usually governed by state law allowing dismissal for insubordination, unprofessional conduct, unfitness, willful neglect of duty, immorality, incompetence, or "other good cause." Less

131. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).
132. Pack v. West Clermont Local School Dist. Bd. of Educ., 492 N.E.2d 1259 (Ohio Com. Pl. 1985).
133. Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985).
134. McIntyre v. Tucker, 490 So. 2d 1012 (Fla. Dist. Ct. App. 1986).
135. LaCroix v. Board of Educ., 505 A.2d 1233 (Conn. 1986).
136. Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).
137. Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 340 S.E.2d 144 (S.C. 1986).
138. Harvey v. Jefferson County School Dist., 710 P.2d 1103 (Colo. 1985).
139. Everett v. Board of Trustees, 492 So. 2d 277 (Miss. 1986).

severe types of discipline, in some instances, are governed by different statutes or policies and often are accompanied by lesser procedural protections. Although state-created procedures vary in terms of the scope of review provided at different levels of the administrative review process, judicial review generally is limited to assessing whether administrative decisions are supported by substantial evidence or whether, on the other hand, they are "arbitrary and capricious."

Because the usual nonrenewal decision does not implicate liberty or property interests, constitutional due process is not necessary; an exception to this is when an employee can show that the real reason for the nonrenewal may have been based on the exercise of a constitutionally protected right, such as free speech. Despite the lack of constitutional due process protections, however, there is a trend for states to provide procedural protections for nonrenewal.[140]

The cases that follow illustrate, among other things, two types of variability: in penalties imposed for infractions that are apparently similar in type or severity, and among state procedures regarding the legitimacy and willingness of a higher level review body to reverse prior administrative decisions. Although it is common for a number of charges to be lumped together in employee discipline cases, a majority of the cases that follow have been placed under the most relevant topic and have not been repeated elsewhere.

Insubordination

In the usual situation where an employee insubordination case was appealed, the employee's claim or defense was unsuccessful. In an exception to this generalization, a ten-year veteran elementary school teacher was transferred to another school but not given any duties because the principal was not expecting her arrival.[141] Because her contract said she should be at her first school, she returned there and spent her time helping other teachers. Her subsequent termination by the superintendent on grounds of insubordination (for not being at the proper school) was reversed because the charge was not supported by substantial evidence.

Four teachers were successfully dismissed on charges of insubordination when: an athletic director and head football coach failed to follow policies regarding the administration of funds;[142] a tenured

140. This generalization is more true for professional personnel than it is for others. *See, e.g.*, Mastrangelo v. Board of Educ., 498 N.Y.S.2d 27 (App. Div. 1986) (secretary-stenographer who was terminated prior to the end of her probationary period was not entitled to a hearing under applicable civil service rules).

141. Noxubee County Bd. of Educ. v. Givens, 481 So. 2d 816 (Miss. 1985).

142. Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).

teacher failed to report to work without proper excusal;[143] a teacher used "extreme profanity" in disciplining students in violation of a prior written prohibition;[144] and a male driver's education teacher willfully disregarded a directive disallowing the driving instruction of only one student at a time.[145] An additional teacher's dismissal for insubordination also was affirmed, but she was awarded her salary during the period of suspension that preceded her dismissal.[146]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

Three times as many employees were unsuccessful in reported actions relevant to this section as were successful. Among those teachers who were found fit were two teachers who had allegedly "physically abused" an emotionally disturbed eighth grader.[147] The Pennsylvania Supreme Court ruled that the Secretary of Education was empowered to conduct a de novo review, without receiving new evidence, and affirmed that evidence that the teachers had only lightly swatted the student for aggressive conduct precluded dismissal for "cruelty," "intemperance," or "willful and persistent violation" of the state's anticorporal punishment statute. Another court held that a teacher's conduct in putting a student in a closet and later giving him three swats with a yardstick in front of the class with his bluejeans pulled down was not "irremediable conduct" so as to sustain the teacher's dismissal; a psychologist testified that the teacher could conform her future conduct to administrative directions.[148] Also not constituting "willful neglect of duty" was a gym teacher's unintentional rental of an "R" rated movie, "Blue Thunder" (which contained a silhouetted nude scene and mild profanity), where the teacher had been instructed to rent videos to use during bad weather.[149]

In one of the more unusual fact patterns, remand was necessary to determine whether an exonerated teacher had been guilty of "conduct unbecoming a teacher" under the "preponderance of the evidence" standard rather than the higher "clear and convincing evidence standard."[150] Even though the teacher's alleged conduct (offering a high

143. Zanavich v. Board of Educ., 513 A.2d 196 (Conn. App. Ct. 1986).
144. Ware v. Morgan County School Dist. RE-3, 719 P.2d 351 (Colo. Ct. App. 1985).
145. Crump v. Board of Educ., 339 S.E.2d 483 (N.C. Ct. App. 1986). The teacher involved in this case was also accused of immorality, but that charge did not have to be considered by the court in view of the finding of insubordination.
146. Harvey v. Jefferson County School Dist., 710 P.2d 1103 (Colo. 1985).
147. Belasco v. Board of Pub. Educ., 510 A.2d 337 (Pa. 1986).
148. Swayne v. Board of Educ., 494 N.E.2d 906 (Ill. App. Ct. 1986).
149. Terry v. Houston County Bd. of Educ., 342 S.E.2d 774 (Ga. Ct. App. 1986).
150. Board of Educ. v. State Bd. of Educ., 497 N.E.2d 984 (Ill. 1986).

school student $500 to kill the principal and two assistant principals, and later allegedly soliciting a former student to kill the principal) might be criminal in nature, the higher standard of proof was unwarranted in an administrative proceed because the school had a strong interest in protecting the student body.

Among cases where employees were ultimately unsuccessful were several where the charges were similar to those found in the "immorality section," suggesting that "unprofessional conduct" and "immorality" charges often may not be dissimilar or that the definitions of these charges vary from state to state. Cases where orders of dismissal were affirmed or reinstated concerned a school custodian who had possessed a controlled substance in his home ("other improper conduct" not limited to that which takes place at school);[151] another custodian whose possession charge was dismissed due to illegally seized evidence (exclusionary rule not applicable to administrative hearings);[152] a tenured elementary school principal who was arrested and convicted of possession of marijuana with intent to distribute;[153] and a teacher who had allowed cheerleaders to drink beer in a motel while on a school-sponsored trip ("neglect of duty" affirmed).[154] Even where a teacher's criminal conviction for theft was later reversed, he did not prevail in seeking reinstatement.[155] Since there was no new relevant evidence regarding the alleged mishandling of money collected for a school-related trip to Hawaii, and since the teacher had not appealed the administrative decision, he could not later allege a denial of due process in federal court.

Physical abuse of students was the subject of two neglect of duty cases, one where a male teacher repeatedly struck junior and senior high school boys in the groin (declared not a "remediable teaching deficiency");[156] and another where a tenured, physical education teacher was dismissed after twelve years of teaching for kicking a student in the thigh in anger.[157] In the latter case, since the hearing panel did not find evidence to substantiate additional charges, the case was remanded to reassess the dismissal sanction.

A teacher who failed to report for work for two weeks at the beginning of a school year was properly dismissed for "neglect of

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151. School Dist. v. Pulier, 500 A.2d 905 (Pa. Commw. Ct. 1985).
152. Deshields v. Chester Upland School Dist., 505 A.2d 1080 (Pa. Commw. Ct. 1986).
153. Summers v. Vermillion Parish School Bd., 493 So. 2d 1258 (La. Ct. App. 1986).
154. Blaine v. Moffact County School Dist. RE No. 1, 709 P.2d 96 (Colo. Ct. App. 1985).
155. Gleason v. Board of Educ., 792 F.2d 76 (7th Cir. 1986).
156. Mott v. Endicott School Dist. No. 308, 713 P.2d 98 (Wash. 1986).
157. Thomas v. Cascade Union High School Dist. No. 15, 724 P.2d 330 (Or. Ct. App. 1986).

duty."[158] Following the August 17th notice to him from the state tenure commission that the purported cancellation of his contract had been unjust, he had an obligation to report to work at the opening of the school year; the school had no duty to notify him of the starting date. Dismissal also was affirmed against a teacher who was often absent and refused to follow school regulations,[159] a teacher who lacked organizational ability,[160] and a long-time secretary who shouted at staff members and refused to follow orders.[161]

Immorality

Among those cases where adverse employment actions were based on "immorality," drug cases and those involving improper sexual conduct predominated. While one teacher who had distributed and allowed students to use pills and marijuana was successfully discharged,[162] two other teachers who allegedly possessed marijuana were reinstated. In one case, there was no evidence that the teacher had knowledge or control over marijuana plants found in a communal garden at his home,[163] and in the other case the board did not show a "rational nexus" between the conduct performed outside of work and work-related duties (i.e., that the behavior affected performance or became a subject of notoriety).[164]

The majority of the improper sexual conduct cases concerned teachers' conduct with students. In a case where a male teacher was exonerated, it was determined that there was insufficient evidence of his alleged sexual assault of a male student.[165] In another case, a teacher was properly suspended without pay for a semester based upon credible evidence that he exposed himself to several fifth and sixth grade students during individual music lessons.[166] It was held that "where a teacher's conduct occurs on school grounds during working hours, or otherwise involves students, and is obviously inappropriate, disciplinary actions may be taken without a pleading or showing of adverse effect."[167] The more severe penalty of dismissal was affirmed against a

158. Franklin v. Alabama State Tenure Comm'n, 482 So. 2d 1214 (Ala. Civ. App. 1935).

159. San Dieguito v. Commission on Professional Competence, 220 Cal. Rptr. 351 (Ct. App. 1985).

160. Kirtley v. Dardanelle Pub. Schools, 702 S.W.2d 25 (Ark. 1986).

161. Botkin v. Board of Educ., 504 N.Y.S.2d 521 (App. Div. 1986).

162. Nolte v. Port Huron Area School Dist. Bd. of Educ., 394 N.W.2d 54 (Mich. Ct. App. 1986) (decision of Commissioner supported by evidence).

163. Forehand v. School Board, 481 So. 2d 953 (Fla. Dist. Ct. App. 1986).

164. Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220 (W. Va. 1986).

165. Ferris v. Austin, 487 So. 2d 1163 (Fla. Dist. Ct. App. 1986).

166. Miller v. Grand Haven Bd. of Educ., 390 N.W.2d 255 (Mich. Ct. App. 1986).

167. *Id.* at 259.

male elementary school teacher who pinched three second-grade female students on the buttocks.[168] The conduct was held not "remediable" because it had immediate adverse psychological effects on the children involved, harmed the reputation of the school, and had a high probability of recurrence. Similarly, the dismissal of another male teacher was affirmed where evidence showed he had improper sexual contact with a twelve-year-old emotionally disturbed male student.[169] There was no abuse of discretion when the hearing officer, in her discretion, refused to allow the teacher to depose the student.

In cases involving alleged sexual misconduct out-of-school, one teacher's dismissal was affirmed based on evidence that he sexually abused the two young daughters of a woman with whom he lived;[170] and another teacher's dismissal was remanded to the state fair dismissal board for its determination whether, in its own discretion rather than in its perception of community opinion, the teacher's act of sexual intercourse in an adult bookstore was immoral.[171]

Other teachers were successful in defending against adverse employment actions based on immorality in cases involving an out-of-wedlock pregnancy;[172] the knowing transportation of stolen securities (because the dismissal penalty was "too severe" in light of the teacher's previous record);[173] and the alleged making of immoral advances toward female students (because the language used was not sufficient to show sexually provocative or exploitive conduct).[174]

Teachers, a principal, and a guidance counselor were unsuccessful in cases involving attempting to cash an endorsed social security check found in a locker room;[175] permitting male wrestlers and female cheerleaders to occupy the same accommodations on a trip to a state wrestling meet;[176] attempting to establish a "social/emotional" relationship with a sixteen year old student;[177] claiming to be ill in order to engage in recreation (and other instances of lying);[178] and instructing a light-weight wrestler to weigh-in for an overweight wrestler at a tournament.[179]

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168. Board of Educ. v. Hunt, 487 N.E.2d 24 (Ill. App. Ct. 1985).
169. Rosenberg v. Board of Educ., 710 P.2d 1095 (Colo. 1985).
170. Lile v. Hancock Place School Dist., 701 S.W.2d 500 (Mo. Ct. App. 1985).
171. Ross v. Springfield School Dist. No. 19, 716 P.2d 724 (Or. 1986).
172. Eckmann v. Board of Educ., 636 F. Supp. 1214 (N.D. Ill. 1986).
173. Pawtucket School Comm. v. Board of Regents, 513 A.2d 13 (R.I. 1986).
174. Madril v. School Dist. No. 11, 710 P.2d 1 (Colo. Ct. App. 1985).
175. McBroom v. Board of Educ., 494 N.E.2d 1191 (Ill. App. Ct. 1986).
176. Schmidt v. Board of Educ., 712 S.W.2d 45 (Mo. Ct. App. 1986).
177. Keating v. Board of School Directors, 513 A.2d 547 (Pa. Commw. Ct. 1986).
178. Fontana Unified School Dist. v. Burman, 225 Cal. Rptr. 484 (Cal. Ct. App. 1986).
179. Florian v. Highland Local School Dist. Bd. of Educ., 493 N.E.2d 249 (Ohio Ct. App. 1983).

Incompetence

As in prior years, most reported cases of incompetence are resolved in favor of school boards' adverse employment decisions. For example, a state supreme court held that a tenured teacher was properly dismissed for "just cause" following a year-and-a-half of attempts to help her correct problems with discipline, grading, leaving students unattended in the classroom, tardiness, etc.[180] However, another teacher was reinstated with back pay because of a school board's failure to allow for remediation of "substandard performance."[181] This latter case represents the first in two years where a teacher was successful in reversing a dismissal decision based on incompetence. An additional teacher/principal successfully challenged a transfer decision, under a state statute mandating a hearing, when it was held that the proposed transfer was not for "legitimate or reasonable administrative purposes": the evidence did not support the allegation of a discipline problem at the school from which the employee was to be transferred.[182]

In a classic case of incompetence, an appeals court held that a thirteen-year veteran teacher was properly terminated for "incompetency and inefficiency in line of duty" for: failure to properly supervise students during recess and field trips, failure to "show energy and vitality," failure to work effectively with parents, failure to pursue college course work, failure to maintain good relationships with students, failure to treat students fairly, failure to define rules for students, failure to deal adequately with discipline problems, and failure to move around and talk sufficiently loud during classes.[183]

Other employees who unsuccessfully sought reinstatement following dismissal for incompetence included a sixty-six year old, tenured home economics teacher who did not follow curriculum guides and did not maintain appropriate discipline;[184] and a bus driver who backed up a bus without proper supervision and unilaterally changed the order of the bus stops.[185] In the first of these cases, the court held that the school district had no obligation to transfer the teacher to a grade school position (where she previously had taught satisfactorily) and, in the second case, the dismissal penalty suffered by the bus driver did not "shock one's sense of fairness."

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180. Wilson v. DesMoines Indep. Community School Dist., 389 N.W.2d 681 (Iowa 1986).

181. Iven v. Hazelwood School Dist., 710 S.W.2d 462 (Mo. Ct. App. 1986).

182. Alabama State Tenure Comm'n v. Lowndes County Bd. of Educ., 479 So. 2d 1269 (Ala. Civ. App. 1985).

183. Cozad v. Crane School Dist. R-3, 716 S.W.2d 408 (Mo. Ct. App. 1986).

184. Stamper v. Board of Educ., 491 N.E.2d 36 (Ill. App. Ct. 1986).

185. Brigandi v. Board of Educ., 500 N.Y.S.2d 740 (App. Div. 1986).

Compliance with School Board Policies and State Statutes

Before a school district decides to implement an adverse employment decision, it usually is necessary to consider the applicability of state or local procedural mandates. However, where an adverse employment decision is made for reasons other than discipline (e.g., the simple nonrenewal of a term contract, a temporary suspension because of illness, or a change in curricular or extracurricular assignment for educational reasons), special procedural protections often are not available.

The cases reported in this subsection overlap to some extent with cases reported in other subsections, particularly those immediately preceeding this one and those reported in the section on procedural due process. Rather than repeat cases mentioned in other places, the cases reported here are those that focused on aspects of compliance with state and local law rather than on compliance per se or on the substantive issue involved (e.g., incompetency).

Among cases where employees were successful in challenging the sufficiency of compliance with state statutes was a situation involving a tenured fourth grade teacher dismissed for "inefficiency."[186] An appellate court remanded the case for a determination as to whether the board allowed a ninety-day period for remediation, as required by state law. Also successful was a teacher and head football coach who was transferred to a full-time teacher position (after a hearing) because of several losing seasons, a revenue decline, incompetent supervision of players, and loss of credibility with the public.[187] The coach was held entitled, by statute, to an evaluation and an opportunity to improve before his transfer.

Among other employees who successfully relied on state law were a probationary teacher who received two years of back pay (less amount earned in mitigation) for the board's failure to follow a statutory procedure in a nonrenewal decision;[188] an employee of the building and grounds department who was improperly suspended by a supervisor rather than by the superintendent of schools;[189] an assistant superintendent who was fired without the recommendation of the superintendent;[190] a teacher who was awarded back pay for the period between his suspension and hearing (salary was a right—it was not "damages"

186. Rowley v. Board of Educ., 500 A.2d 37 (N.J. Super. Ct. App. Div. 1985)
187. Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986).
188. Westen Grove School Dist. v. Stain, 707 S.W.2d 306 (Ark. 1986).
189. Stoetzel v. Wappingers Cent. School Dist., 497 N.Y.S.2d 788 (App. Div. 1986).
190. Greater Clark County School Corp. v. Myers, 493 N.E.2d 1267 (Ind. Ct. App. 1986).

subject to mitigation);[191] a long-time principal who was awarded an increase in salary because his transfer, in effect, was a demotion;[192] and a tenured teacher, assigned to teach electronics but not certified in that subject, who was granted a hearing despite a state statute prohibiting employment outside of one's certification area.[193]

Employees were not the beneficiaries of state statutory protections in cases where a thirty-day warning letter was properly sent prior to termination (statutory period may be enlarged but not reduced);[194] where reversible error was committed by a trial court's failure to make special findings of fact when reversing a school board's dismissal decision (because the reviewing court could not tell whether evidence was lacking or the lower court inappropriately substituted its own judgment);[195] where a board had complied with a state statute requiring that demotion of principals be made pursuant to a private or public hearing before the board, and not before an impartial hearing officer as decided by a lower court;[196] and where a teacher was not entitled to a statutory salary increment that previously had been withheld for excessive absenteeism.[197]

In addition to the above cases, a principal was unsuccessful in his attempt to have his one-semester suspension revoked for breach of a board regulation requiring him to "take reasonable precautionary measures" for the health and safety of students: he had failed to get parental permission slips and to inspect buses before a sixth grade trip to Meramec Caverns (where one student drowned).[198] Where a board did not adhere to its own policies requiring remediation, however, a librarian's termination for incompetency was held invalid.

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

A reduction-in-force (RIF), which results in dismissing employees or placing them on involuntary leaves of absence, can result from the consolidation of school districts, reorganization within a district, or programmatic reorganizations within schools. The necessity for a RIF, the selection of employees to be adversely affected, the realignment or

191. Hawley v. South Orangetown Cent. School Dist., 501 N.Y.S.2d 318 (1986).
192. Foster v. Board of Elementary and Secondary Educ., 479 So. 2d 489 (La. Ct. App. 1985).
193. Loftus v. Board of Educ., 509 A.2d 500 (Conn. 1986).
194. Cozad v. Crane School Dist. R-3, 716 S.W.2d 408 (Mo. Ct. App. 1986).
195. Scott County School Dist. 2 v. Dietrich, 496 N.E.2d 91 (Ind. Ct. App. 1986).
196. Meadows v. School Dist. U-46, 490 N.E.2d 140 (Ill. App. Ct. 1986).
197. Cordasco v. Board of Educ., 501 A.2d 171 (N.J. Super. Ct. 1985).
198. Bell v. Board of Educ., 711 S.W.2d 950 (Mo. Ct. App. 1986).

reassignment of retained employees, and call-back rights are governed by state statutory requirements, local school board policies, and collective bargaining agreements.[199]

Employees affected adversely by a necessary RIF usually do not have the type of "legitimate claim of entitlement" that would allow for constitutional due process protections; and while state law sometimes gives such employees procedural rights (especially when the adverse action is characterized as a "dismissal"), more often than not, few procedural protections are available. A case that illustrates the exceptional rule, where procedural protections were available, was settled in Massachusetts in 1985.[200] There, a woman who had served five years as the principal of an elementary school was dismissed when her school was closed for budgetary reasons. The court held that state statutes providing procedural protections for tenured "teachers" also applied to "principals," who are teachers with special managerial duties.

Constitutional procedural due process is available, in unusual circumstances, when employees claim that RIF decisions were made in a manner that violated their constitutional rights (e.g., to equal protection or free speech). An example of such a situation was discussed in the race discrimination section, where a voluntary RIF provision in a collective bargaining agreement was held to violate equal protection because it, in effect, disfavored senior white teachers while favoring less senior minority teachers.[201] RIF cases raising constitutional issues are dealt with in the first three sections of this chapter.

Although not strictly a matter of RIF, this section also contains an occasional case where RIF principles or statutory provisions were applied in cases where educational reorganization efforts did not result in RIF or fewer positions, but nonetheless had an adverse impact on particular employees.

Necessity for Reduction-in-force

When educational programs are reorganized, there must be valid economic or educational reasons for the reorganizations. Resulting dismissals or layoffs are prima facie legitimate, but can be challenged by employees, who bear the burden of proving that positions were

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199. As is true in situations of dismissal and discipline, nonprofessional employees often have fewer state-created procedural and substantive protections than do a school district's professional employees. *See, e.g.*, State v. Middletown City School Dist. Bd. of Educ., 485 N.E.2d 768 (Ohio Ct. App. 1984) (classified civil service employees could not exercise displacement rights because the statute regulating such rights exempted employees of cities—which included employees whose salaries were set by the city).

200. Rantz v. School Comm. of Peabody, 486 N.E.2d 44 (Mass. 1985).

201. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).

abolished for other than legitimate reasons.[202] For those employees who do not challenge the proposed elimination of positions and the reasons therefore, at least one appellate court has held that the employees conceded the propriety of the district's actions.[203]

Cases which illustrate legitiate reasons for reorganization include the following where: a substantial decrease in overall enrollment was sufficient evidence to sustain the suspension of teachers in drivers education and photography, despite the lack of decreased enrollment in those classes,[204] and anticipated budget problems justified the suspension of a music teacher pursuant to a decision to eliminate a music program (the programmatic changes were made for "educational reasons").[205] It is clear that most states do not require that decisions to eliminate particular positions be individually justified, as long as legitimate financial or educational reasons are evidenced.[206]

Elimination of Position

Several cases in the previous subsection illustrate the flexibility maintained by school districts in choosing which positions to eliminate for good faith economic or educational reasons. In an analogous situation, where the absolute number of positions was actually increased by half a position, and where evidence of enrollment decline and financial need was lacking, a part-time administrative position nevertheless was legitimately discontinued and its components consolidated into a new full-time position.[207] Even though this action resulted in the administrator (who also held a full-time teaching position) being put on unrequested leave from the original part-time administrative position, it was held to be a bona fide discontinuance of the position. A final case illustrates that general allegations of "bad faith" in the abolition of positions are insufficient to present an issue of fact for trial.[208]

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202. *See* Page v. Franklin County School Bd., 481 So. 2d 43 (Fla. Dist. Ct. App. 1985).

203. Roseville Educ. Ass'n v. Independent School Dist. No. 623, 391 N.W.2d 846 (Minn. 1986).

204. Mongelluzzo v. School Dist., 503 A.2d 63 (Pa. Commw. Ct. 1985).

205. Glendale School Dist. v. Feigh, 513 A.2d 1093 (Pa. Commw. Ct. 1986).

206. *See, e.g.*, Bye v. Special Intermediate School Dist. No. 916, 379 N.W.2d 653 (Minn. Ct. App. 1986). In this case, despite the court's holding that there was no need to legitimate the decision to eliminate particular positions, it also held that the elimination of a dental lab position was not supported by the evidence, which indicated substantial enrollments for the lab course.

207. Bates v. Independent School Dist. No. 482, 397 N.W.2d 239 (Minn. Ct. App. 1986).

208. Gagnon v. Board of Educ., 500 N.Y.S.2d 801 (App. Div. 1986).

Selection of Employee

Although employees may have no statutory right to notice and a hearing for temporary, budgetary suspensions,[209] a school board has the responsibility to make rational decisions when selecting employees for a RIF. One school board's decision to place on unrequested leave only those teachers who did not request a hearing concerning proposed layoffs (even though some of them were senior to teachers who were retained) was reversed as arbitrary.[210] On the other hand, a school board acted appropriately in transferring an administrator to a teaching position when an administrative position was eliminated for financial reasons, especially since the teacher had not been certified as an administrator in the first instance.[211]

As is true in simple or multiple realignment situations, the selection of employees for RIF often is based on a number of criteria, including seniority, licensure, tenure, and experience, with seniority the predominate criterion. In one case, when a teacher layoff was required among shop instructors, the board illegally laid-off a teacher who was entitled to seniority credit for the years he had served in the armed forces under the state's veterans' preference act.[212] On the other hand, a teacher was not entitled to seniority credit for the years she had taught communications skills prior to her appointment as a probationary reading teacher because, under state provisions, these positions were in distinct tenure areas.[213] Analogously, a teacher could not claim seniority credit for a period he had worked as an instructional aide before becoming a teacher.[214] And a final case held that "subjective" performance criteria in a RIF policy were legitimate and did not evidence discriminatory intent.[215]

Realignment/Reassignment

Seniority is also a recurrent criterion in realignment or reassignment decisions, as illustrated by the following cases. When his school was closed, an assistant principal was demoted to teacher in violation of a state statute permitting him to "bump" one of the district's less senior

209. *See* Ciccone v. Cranston School Comm., 513 A.2d 32 (R.I. 1986) (appeal procedures are reserved for those who face permanent dismissal).

210. Roseville Educ. Ass'n v. Independent School Dist. No. 623, 380 N.W.2d 512 (Minn. Ct. App. 1986).

211. School Dist. v. Brockington, 511 A.2d 944 (Pa. Commw. Ct. 1986).

212. Northeastern Employee Intermediate Unit No. 19 v. Stephens, 510 A.2d 1267 (Pa. Commw. Ct. 1986).

213. Moore v. Board of Educ., 500 N.Y.S.2d 710 (App. Div. 1986).

214. *In re* Proposed Placement on Unrequested Leave of Absence, 381 N.W.2d 476 (Minn. Ct. App. 1986).

215. United States v. Mississippi, 641 F. Supp. 232 (S.D. Miss. 1986).

assistant principals.[216] Even though the school district's reorganization plan did not require the lay-off of employees, the court held that the statute requiring reassignment by seniority was applicable. Additional cases allowed a plaintiff who had served for more than three years while certified as a principal to bump an untenured principal (one who had served as principal fewer than three years while certified);[217] a junior high school principal to bump a senior high school principal rather than accept assignment as a senior high school assistant principal;[218] and a teacher with veterans credit to bump someone without such credit.[219]

Several cases illustrate that teachers cannot claim realignment rights when they are not certified and qualified.[220] In one case, a teacher was reinstated to her middle school guidance position because bumping rights were not permitted to a more senior teacher who, despite completion of certification requirements, was not certified at the time of his reassignment.[221] In a complex case involving the layoff of over 400 teachers, remand was necessary to determine if a realignment was possible to accommodate more senior teachers licensed in industrial arts where the district claimed that the teachers it retained held more comprehensive "combined positions."[222] The court stated, nevertheless, that reasonable realignment would not require the splitting of combined positions.

In New York State, where tenure often is earned in discrete tenure "areas," one court held that a junior high school health teacher could not bump a less senior teacher in a "general junior high school" academic subject, because health had been maintained as a separate tenure area.[223] Another New York case held that a teacher laid-off from his position as a trade and industrial training program coordinator was entitled to bump in the general "secondary area"; the district had not effectively created a separate tenure area in the teacher's prior position and had not notified the teacher that his tenure area was unique.[224]

Experience within the field and other miscellaneous qualifications also have been held valid in situations involving realignment. Lack of successful relevant teaching experience precluded a teacher of visually

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216. Abington School Dist. v. Pacropis, 506 A.2d 485 (Pa. Commw. Ct. 1986).
217. Rantz v. School Comm., 486 N.E.2d 44 (Mass. 1985).
218. Gibbons v. New Castle Area School Dist., 500 A.2d 922 (Pa. Commw. Ct 1985).
219. James v. Big Bever Falls Area School Dist., 511 A.2d 700 (Pa. Commw. Ct. 1986).
220. See, e.g., *In re* Proposed Placement on Unrequested Leave of Absence, 381 N.W.2d 476 (Minn. Ct. App. 1986) (lack of certification and teaching experience negated realignment rights).
221. Wattsburg Area School Dist. v. Jarrett, 513 A.2d 588 (Pa. Commw. Ct. 1986).
222. Brandhorst v. Special School Dist. No. 1, 392 N.W.2d 888 (Minn. 1986).
223. Hicksville Congress of Teachers v. Hicksville Union Free School Dist. Bd. of Educ., 499 N.Y.S.2d 774 (App. Div. 1986).
224. Boyer v. Board of Educ., 503 N.Y.S.2d 981 (Sup. Ct. 1986).

impaired students from bumping a less senior elementary school teacher, where the collective bargaining agreement required such experience;[225] and a female home economics teacher was held not qualified to bump a male physical education teacher (though she was certified in physical education) because the physical education position required supervision of the boys' locker room.[226]

Realignment decisions in cases involving more than one school district present some problems that are unique. For example, where one district discontinued its business education program and contracted with a neighboring district to provide two classes for the first district, a teacher who was laid-off had no right to realignment within the second district under a state statute providing for realignment by seniority when "grades or portions of grades" from two districts are consolidated. In another case, a tenured teacher at a state-operated school for the hearing impaired, who was laid-off for financial reasons, put forth an unsuccessful claim for system-wide tenure.[227] Because she had been offered and rejected a full-time position at her previous school, she abandoned her tenure rights and her right to reemployment.

In a case illustrating the complexity of multiple bumping, Blythe was properly given preference over plaintiff-James because of a veteran's preference act; and, the district was not required to allow James (who was certified only in social studies) to bump a less senior teacher (certified in social studies, Spanish, and elementary education—and actually teaching social studies and Spanish) who then would have been required to bump an elementary education teacher (leaving no one to teach the Spanish courses).[228] The court recognized the impracticality of such a realignment in situations where an employee has multiple certification.

Call-back Rights

State statutes or local agreements usually provide limited call-back rights for employees who have been subject to involuntary lay-offs. While seniority may be respected during the call-back period,[229] entitlement to reappointment may be limited in duration[230] and may not provide for multiple realignment. While call-back rights knowingly can

225. Blank v. Independent School Dist. No. 16, 393 N.W.2d 648 (Minn. 1986).
226. Zink v. Board of Educ., 497 N.E.2d 835 (Ill. App. Ct. 1986).
227. O'Toole v. Forestal, 511 A.2d 1236 (N.J. Super. Ct. App. Div. 1986).
228. James v. Big Bever Falls Area School Dist., 511 A.2d 900 (Pa. Commw. Ct. 1986).
229. *See, e.g.*, Poppers v. Tamalpais Union High School Dist., 229 Cal. Rptr. 77 (Ct. App. 1986) (state law mandated reappointment of most senior qualified terminated employees).
230. *See* Masto v. Board of Educ., 511 A.2d 344 (Conn. 1986) (former assistant high school principal was entitled to call-back rights for only one year).

be waived, one court held that a teacher did not waive call-back rights or the right to remain on the preferred eligible list by rejecting a mid-year offer of reemployment.[231]

In New York State, which extends call-back rights to positions that are "similar," a board was directed to reinstate a former junior high school math teacher to a senior high school math position.[232] The teacher was qualified, had seniority, and the positions were similar (math in grades seven through twelve was one tenure area). In another action, where a guidance counselor had been reassigned to a social studies position (when three districts were consolidated into two), he had no right to be recalled to a guidance position, but only to any vacancy for which he was qualified.[233]

CONTRACTUAL DISPUTES

Contractual problems can arise concerning almost any aspect of the employer-employee relationship, but the most important problems concern the validity of the employment contract itself. For a valid contract to exist, there must be an offer, an acceptance of that offer, and "consideration" (usually a quid pro quo, such as a promise to work in exchange for a promise of salary). Among the questions that arise are whether there was an offer, whether it was revoked before acceptance, whether there was a valid acceptance, whether a contract arose by operation of law, and whether a party to the contract breached the contract. The cases that follow involve these questions, among others, and illustrate the great variety of problems that can arise in the making and enforcing of contracts and in the interweaving of common law contract principles with state administrative and statutory provisions.

Board Policies and Contract Stipulations

A state court of appeals, applying the common law doctrine of promissory estoppel, held that a school board could not deny the validity of a teacher's employment contract.[234] The teacher, who previously had taught Spanish and Italian under two one-year contracts, was twice told by the principal that she would be rehired for the following year; she read a notice posted by the principal promising that all faculty would be rehired; and she relied on such promises to her

231. Lewis v. Cleveland Hill Union Free School Dist., 506 N.Y.S.2d 608 (App. Div. 1986).
232. Kohler v. Board of Educ., 505 N.Y.S.2d 924 (App. Div. 1986).
233. Valentine v. Joliet Township High School Dist. No. 204, 802 F.2d 981 (7th Cir. 1986).
234. D'Ulisse-Cupo v. Board of Directors, 503 A.2d 1192 (Conn. App. Ct. 1986).

detriment. Not so successful was a tenured third grade teacher who received a new contract conditioned upon her receipt of recertification by July 10th.[235] The court held that by failing to sign the board's contract offer within a stated period of time, the offer had been revoked by operation of law, and the teacher had no further right to employment.

Two cases involved the issue of breach of contract. In the first, a school board's failure to give reasons for the nonrenewal of a part-time principal, and an opportunity to improve, violated its own policies and thus amounted to a breach of contract.[236] The principal in this case was partly unsuccessful, however, because the court vacated her recovery of damages for loss of earning capacity and mental anguish as not recoverable in a breach of contract action. In the second case, a tenured teacher who wished to resign his coaching duties while retaining his tenured teaching position was told that his coaching and teaching duties were contractually linked.[237] The court held that the teacher had properly sought a declaratory judgment regarding whether his resignation from coaching would breach his contract because, absent a cancellation of his contract, the teacher had no remedy under the state's tenure law.

There were several cases reported in 1986 concerning the interpretation of contractual provisions. In one case the contract was "unambiguous" in providing for the continued maintenance of certification, thereby justifying the dismissal of a teacher;[238] and in another case ambiguous language was interpreted to entitle a plaintiff to any head coaching position that might arise, not only to a head football coaching position.[239] In addition, reemployment was granted under a collective bargaining agreement to a noncertified teacher (who had taught under a statute permitting noncertified persons to teach), where the teacher was granted a sabbatical for "teachers" and returned fully certified: he was thus, a "teacher" for purposes of reemployment.[240] Not so fortunate was a teacher who, because of a bureaucratic mix-up, failed to obtain recertification within a two-month grace period allowed by the district.[241] The court held that the teacher's retroactive recertification was not sufficient to affect disciplinary actions (short term suspension and loss of salary) taken by the board pursuant to a valid contract that

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235. Nelson v. Doland Bd. of Educ., 380 N.W.2d 665 (S.D. 1986).

236. Myrtle Springs Reverted Indep. School Dist. v. Hogan, 705 S.W.2d 707 (Tex. Ct. App. 1985).

237. Moss v. Williams, 409 So. 2d 575 (Ala. 1986).

238. Gamble v. Mills, 483 So. 2d 826 (Fla. Dist. Ct. App. 1986).

239. United States v. Mississippi, 641 F. Supp. 232 (S.D. Miss. 1986).

240. South Conejos School Dist. RE-10 v. Martinez, 709 P.2d 594 (Colo. Ct. App. 1985).

241. Singleton v. Hony County School Dist., 345 S.E.2d 751 (S.C. App. 1986).

the teacher would possess certification.

Administrative Regulations and Statutory Provisions

Among cases reported in 1986, about an equal number dealt with the interpretation or application of state statutory or administrative provisions affecting contracts as involved local contract provisions. Also reflected among these cases are issues involving the creation, termination, and interpretation of contracts, with cases concerning creation (offer and acceptance) predominating.

Illustrating how technical legal provisions can both negatively and positively affect employees are three cases involving administrators. In one, although the school board voted to offer a principal a new two-year contract, which both the principal and the board president signed, the contract was held not valid because it had not been signed by the secretary of the board as required by state law; therefore, the board's subsequent nonrenewal of the principal was valid.[242] Also invalid was the attempted withdrawal by a principal of his offer to resign.[243] Although the principal (who resigned in the middle of the Fall semester saying "I am not doing the professional job which I think is necessary") apparently had second thoughts, they came too late: the court held that state law expressly provided for acceptance of a resignation by the superintendent (which was done), and not by the board as the former principal argued. The legitimacy of a four-year contract saved the job of a superintendent when a succeeding school board sought his removal.[244] A court of appeals held that the prior board had validly increased the term from one to four years because it was done before the superintendent accepted the initially proferred one-year term contract.

Among the cases involving "acceptance" of offers was a case where a tenured teacher's failure to return a contract offer within a thirty-day statutory period resulted in loss of tenure status;[245] where a school board's failure to void a teacher's contract and to timely notify the teacher of nonrenewal resulted in automatic renewal;[246] where a teacher was barred by statute from participating in a state professional improvement program because he owed continuing education debts (failure to meet conditions of offer precluded acceptance);[247] and where

242. Morton v. Hampton School Dist. No. 1, 700 S.W.2d 373 (Ark. Ct. App. 1985).
243. Warren v. Buncombe County Bd. of Educ., 343 S.E.2d 225 (N.C. Ct. App. 1986).
244. Stagnolia v. Board of Educ., 714 S.W.2d 486 (Ky. Ct. App. 1986).
245. Walker v. Sierra Vista Unified School Dist. No. 68, 712 P.2d 451 (Ariz. Ct. App. 1985). Although the board in this case had the power to offer the teacher a continuing contract, it chose not to do so, offering him instead a contract requiring a new probationary period.
246. Noxubee County School Bd. v. Cannon, 485 So. 2d 302 (Miss. 1986).
247. Anderson v. State, 481 So. 2d 719 (La. Ct. App. 1985).

a maintenance employee (who admitted to signing in for two days she had not worked) resigned rather than be subjected to dismissal.[248] In the latter case, the court held that "[w]hen a choice is made between two validly imposed alternatives, duress is absent as a matter of law."[249] (The offer of two valid alternatives cannot void the acceptance of one—there is no duress when there are alternatives.)

The first case of alleged breach of contract illustrates how state law can operate to negate what might otherwise be a breach. A school psychologist, who had worked one year of a two-year contract, was legally dismissed pursuant to a state statute permitting the suspension of contracts because of a decrease in student enrollment.[250] Another employee, alleging breach of contract when she was not permitted to return to work following absence for an eye injury, was admonished to seek administrative remedies before bringing her judicial action.[251]

Cases involving the interpretation of contract provisions held, respectively, that a teacher who worked more than 60% time during one semester was not entitled, under state law, to be classified as a probationary (rather than temporary) employee because the statute required more than 60% full-time work for a full school year;[252] that Saturday and Sunday are not "public holidays" during which teachers have a statutory right not to work;[253] and that a statute prohibiting the employment of teachers who are also elected school-board members does not mean that a teacher may not run for school-board office, as long as he agrees to resign his teaching position if elected.[254]

TENURE

When an employee has earned the right to "tenure," or to a "continuing contract," or to be employed "at discretion," employment can be terminated only in limited circumstances. As was seen in the section on reduction-in-force (RIF), tenured employees can be subject to dismissal or involuntary layoff when legitimate reorganization necessitates reducing the size of the workforce. Apart from those few situations where the police power of the state permits the dismissal of tenured employees (e.g., because of a legitimate RIF or because of

248. Atkins v. Birmingham City Bd. of Educ., 480 So. 2d 585 (Ala. Civ. App. 1985).
249. *Id.* at 586.
250. Bennett v. Board of Educ., 491 N.E.2d 742 (Ohio Ct. App. 1985).
251. Alabama Ass'n of School Bds. v. Walker, 492 So. 2d 1013 (Ala. 1986).
252. Berkeley Fed'n of Teachers v. Berkeley Unified School Dist., 224 Cal. Rptr. 44 (Ct. App. 1986).
253. Penns Grove-Carneys Point Educ. Ass'n v. Board of Educ., 506 A.2d 1289 (N.J. Super. Ct. App. Div. 1986).
254. LaBosco v. Dunn, 502 N.Y.S.2d 200 (App. Div. 1986).

failure to pass state-required competency examinations), tenured employees may only be dismissed "for cause," as defined in state statutes (e.g., incompetency, immorality, willful neglect of duty, etc.). "For cause" dismissals require that affected employees be provided procedural due process; tenure rights are property rights protected by the fourteenth amendment.

Those employees who may acquire tenure are defined by state law, and variously include noncertificated employees, administrators, supervisors, and teachers; among these, only teachers may acquire tenure in all states. While tenure usually is awarded after a specified period of full-time, successful employment in a district or state, in some states teachers and adminstrators acquire tenure only in a particular discipline, area of instruction, or job. Tenure is lost when an employee moves to another state; and, in most states, one loses tenure when one accepts employment in another district.

Whether one can maintain tenure when moving vertically from a teaching to an administrative position or vice versa also depends on state law. Tenured teachers usually retain their right to tenure, as teachers, when they take administrative positions; however, in those states that award tenure to administrators, the employee may be required to serve another probationary period in order to gain tenure as an administrator. In states that do not award tenure to administrators, downward vertical transfers to the teaching ranks is facilitated; if the administrator has not acquired tenure as a teacher, the board has the option of nonrenewal of a term contract.

Tenure Status

Whether an employee has a right to tenure, and the conditions the employee must meet, vary greatly from state to state. For teachers, the acquisition of tenure usually depends upon successfully serving a probationary period of from two to five years. In a state where a two-year probationary period is required, it was held that a teacher who worked only 180 out of 187 days in his first school year, but who completed a second full year of teaching, did not acquire tenure at the end of the second school year.[255] The court held that the state used the "anniversary date" method of determining the end of the probationary period, so that the teacher could not acquire tenure until October 3rd of his third year. In a state requiring service for the "three previous school years," a teacher who taught two full years and part of a third year before taking unpaid child-rearing leave did not acquire tenure at the

255. Brcuhan v. Plymouth-Canton Community Schools, 389 N.W.2d 85 (Mich. 1986).

end of the third school year.[256] Another case held that once having acquired status as a tenured teacher, nine years of service as an administrator did not negate status as a tenured teacher.[257]

As one of the few states limiting tenure to particular disciplines or areas of teaching responsibility, New York State had more than its share of cases involving tenure status. In one, a teacher with more than twelve years of experience was laid-off when his supervisory position was abolished.[258] The court reinstated the teacher in the "secondary area" because the district had not effectively created a separate tenure area in the position the employee had most recently filled and had not notified the teacher that his tenure area was unique. In another New York case, a board legitimately denied tenure to an administrator who, upon leaving her position as reading coordinator, had to serve a new period of probation.[259] The court further held that the new period of probation began to run from the time the plaintiff was appointed "acting" administrator, rather than from her earlier appointment as an "interim acting" administrator, as she had argued, so that denial of tenure for excessive tardiness was not arbitrary.

Tenure by Default or Acquiescence

When a school board fails to act in a timely manner to properly nonrenew employees before they complete probationary periods, courts have held that employees have acquired tenure by "default" or "acquiescence." For example, an Ohio teacher who did not receive actual notice of nonrenewal in a timely manner obtained a statutory right to a continuing contract.[260] Other teachers obtained tenure because of a statutorily deficient notice;[261] and because of successful service for a fourth year without notice of nonrenewal (despite the school district's attempt to avoid tenure by transferring the teacher to an intermediate school unit).[262]

An additional case where a teacher received tenure illustrates the complexities surrounding two New York statutes: one permitting periods of a term or more served as a regular substitute to count toward tenure (called "Jarema credit"), and the other allowing a teacher who

256. Matthews v. School Comm., 494 N.E.2d 38 (Mass. App. Ct. 1936).
257. Wolfe v. Sierra Vista Unified School Dist. No. 68, 722 P.2d 389 (Ariz. Ct. App. 1986).
258. Boyer v. Board of Educ., 503 N.Y.S.2d 981 (Sup. Ct. 1986).
259. Schensul v. Community School Bd. 32, 504 N.Y.S.2d 213 (App. Div. 1986).
260. State *ex rel.* Francu v. Windham Exempted Village School Dist. Bd. of Educ., 496 N.E.2d 902 (Ohio 1986).
261. Memphis Community Schools v. Henderson, 394 N.W.2d 12 (Mich. Ct. App. 1986).
262. Day v. Prowers County School Dist. RE-1, 725 P.2d 14 (Colo. Ct. App. 1986).

has earned tenure in another New York district to serve a new probationary period of only two rather than three years in his new district. The facts of the case showed that a tenured science teacher resigned a position in the state and was later hired in another New York district. He taught in the new district as a substitute and in a probationary position for nearly three years before the board attempted to "terminate" him. Since the proposed "termination" followed more than two years of teaching in substitute and probationary status, the teacher was entitled to tenure by estoppel, which results when "a school board permits a teacher to continue beyond the time his probationary term expires, without taking any action required by law to grant or deny tenure."[263]

Employees who were unsuccessful in asserting their tenured status included a vice principal who was notified at the conclusion of her three-year term contract that she would not be granted tenure.[264] Because she was terminated effective twenty-three days after three calendar years (which the board argued was compensation for an earlier period when she was laid-off for twenty-three days), she claimed tenure by estoppel. The court held that the probationary period was measured by the calendar year rather than the school year, and was properly extended by the lay-off period.

In a case that illustrates the importance of the position in which one actually serves rather than the title one has, a tenured New York State teacher was denied tenure as a junior high school principal.[265] Although appointed as a junior high school principal, the teacher had in fact worked for several years in central administrative offices. When he later began to serve as a junior high school principal, he was denied tenure by estoppel because "to hold petitioner entitled to tenure in the field position of junior high school principal when all but a few months of his claimed probationary service [had] been in central administration runs contrary to [the] legislative purpose" of determining competency.[266]

CERTIFICATION

Except in extraordinary circumstances, state certification (either temporary or permanent) is required for teachers and administrators to be legally qualified to serve in their positions. As in other areas, standards for certification, its acquisition and maintenance, and decerti-

263. *Id.* at 669.
264. O'Dea v. School Dist., 504 N.Y.S.2d 895 (App. Div. 1986).
265. Roberts v. Community School Bd., 495 N.Y.S.2d 960 (N.Y. 1985).
266. *Id.* at 963.

fication vary from state to state. Whether certification properly has been revoked or suspended, whether one has a right to seek recertification, and under what circumstances, are also matters of state law.

Certification Standards

Cases in this subsection deal with certification status and any attendant procedural protections, and with substantive certification standards and their implementation. In a case that illustrates the need for proper certification, a tenured middle school math teacher, whose provisional teaching certificate had expired, was suspended for a year to allow him to seek certification.[267] An appellate court held that the teacher was not entitled to reinstatement because his new provisional certification was for an elementary school position and, furthermore, was not obtained within a year. In a case illustrative of state discretion in matters of certification criteria and their application, a court would not substitute its judgment for a board of examiners' decision denying a school psychology license.[268] The board determined that one-and-a-half years of experience was not a sufficient substitute for the requirement of a supervised internship. In a final case, a tenured home economics teacher with thirty years of experience was reinstated and awarded back pay after she was improperly discharged without a state-mandated hearing on the issue of her certification status.[269] It was later discovered that the teacher's lack of timely presentation of evidence of her recertification was due to the state's delay.

Decertification, Revocation, or Suspension

In controversies involving decertification, four cases reported instances where teachers were successful and two where teachers were not successful; the latter two cases are particularly interesting because teachers claimed that revocation of certification violated their constitutional rights.

Cases where teachers were successful, or partly successful, in attempts to avoid decertification include those where a teacher's alleged sexual misconduct with a student was not proven by competent, substantial evidence;[270] where there was no evidence that the commission reviewing the revocation had examined an investigative file of evidence;[271] where a teacher was held entitled to an administrative hearing

267. Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).
268. Wagschal v. Board of Examiners, 503 N.Y.S.2d 434 (A.D. 1986).
269. Board of Educ. v. Singleton, 712 P.2d 1384 (N.M. Ct. App. 1985).
270. Ferris v. Austin, 487 So. 2d 1163 (Fla. Dist. Ct. App. 1986).
271. Fields v. Turlington, 481 So. 2d 960 (Fla. Dist. Ct. App. 1986).

on his claim for restoration of his license;[272] and where it was affirmed that the state commissioner of education did not have the power to review a retroactive certification granted by the state department of education.[273]

In a case reported more fully in the subsection on discrimination based on religion, it was held that a teacher's refusal to discontinue wearing religious garb justified the revocation of her teaching certificate.[274] The Oregon Supreme Court held that the revocation, pursuant to statutory authority, was not intended as a punishment but was merely the result of teaching in a manner that was incompatible with maintaining the religious neutrality of the public schools.[275] And a Texas appeals court, assuming the existence of a constitutionally protected contract right, held that revocation of teaching certificates for failure to pass a competency test was a valid exercise of the state's police power.[276]

272. Lubin v. Board of Educ., 501 N.Y.S.2d 31 (App. Div. 1986).

273. Board of Educ. v. Ambach, 499 N.Y.S.2d 499 (App. Div. 1986).

274. Cooper v. Eugene School Dist. No.4J, 723 P.2d 298 (Or. 1986).

275. It is assumed but not reported in this case, that Oregon does not require certification for teaching in private settings; if it did, revocation of the teacher's certification could be considered a punishment.

276. Texas State Teachers Ass'n v. State, 711 S.W.2d 421 (Tex. Civ. App. 1986).